

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THEIN TONY VU,

Petitioner,

v.

DERRAL G. ADAMS, Warden, et  
al.,

Respondents.

CIV-S-01-1249 DFL CMK P

MEMORANDUM OF OPINION  
AND ORDER

Petitioner Thein Tony Vu was convicted in state court on December 16, 1998 of numerous crimes, including conspiracy to commit murder and attempted murder. (Answer at 4.) Vu now brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting two grounds for relief: (1) on its own initiative, the trial court should have instructed the jury on lesser included offenses; and (2) the evidence presented at trial was insufficient to support Vu's conviction for conspiracy to commit murder. Vu also requests an evidentiary hearing on the issues he raises here. Respondent has filed an answer, and petitioner has filed a traverse.

1       The facts of petitioner's case are well known to the  
2 parties, so the court will not repeat them here. On June 19,  
3 2000, the California Court of Appeal denied petitioner's appeal,  
4 considering and rejecting both of the arguments petitioner raises  
5 here. Because the California Supreme Court summarily denied  
6 petitioner's request for review, the Court of Appeal's ruling is  
7 the last reasoned state court decision.

8       The Court of Appeal rejected petitioner's argument regarding  
9 the lesser included offense instructions, finding that the  
10 evidence at trial did not support instructions on either  
11 attempted voluntary manslaughter or conspiracy to commit  
12 voluntary manslaughter. (Answer Ex. B at 6.) Although  
13 California state courts must, on their own initiative, instruct  
14 juries on lesser included offenses, they need only do so "when  
15 there is evidence from which a jury could reasonably conclude  
16 that the lesser offense, but not the greater, was committed."  
17 (Id. at 3.)

18       According to the court, "[t]he record is devoid of evidence  
19 from which a jury could reasonably conclude that defendant acted  
20 rashly in a heat of passion at the time of the shooting at the  
21 house." (Id. at 6.) The alleged "provocation" took place two  
22 days before the shooting and was directed not at Vu, but at the  
23 family he was staying with. (Id.) In addition, Vu's activities  
24 during the day of the shooting -- including "hanging" and  
25 "kicking back" at his friend's house and "cruising around" in the  
26 car for several hours -- did not support the theory that he acted

1 under provocation. (Id. at 13; Rep.'s Tr. at 232, 235.)  
2 Finally, neither petitioner nor his friends had been threatened  
3 or otherwise put in immediate danger on the day of the shooting.  
4 (Answer Ex. B at 13.)

5 The court also noted that the evidence of Vu's intent to  
6 "settle the score" suggested a motive of revenge, which "is not  
7 an acceptable passion under the heat of passion theory." (Id. at  
8 7.) Rather, it suggested planning on the part of petitioner and  
9 the other perpetrators, "which exemplifies reason rather than  
10 heated passion." (Id.) For these reasons, the court held that  
11 the trial court did not err in failing to give instructions on  
12 attempted voluntary manslaughter and conspiracy to commit  
13 voluntary manslaughter. (Id. at 7-8.)

14 The court also found that there was sufficient evidence of  
15 petitioner's intent to kill to support his conviction for  
16 conspiracy to commit murder. The court focused on four portions  
17 of the statement Vu made to the police on the night of the  
18 shooting: (1) petitioner's stated reason for shooting at the  
19 house was because "[Saechao] was up in there," (2) his admitted  
20 role as the "back-up man" who would kill Saechao if he came out  
21 of the house alive, (3) his statement that he only wanted to kill  
22 Saechao, and (4) his expression of his intent to kill Saechao if  
23 he saw him again. (Id. at 9-10.)

24 Petitioner's challenge to the jury instructions fails in the  
25 first instance because a trial court's decision not to instruct  
26 on lesser included offenses does not present a federal

1 constitutional question in non-capital cases, unless the failure  
2 to instruct interferes with the defendant's "right to adequate  
3 instructions on his or her theory of defense." Bashor v. Risley,  
4 730 F.2d 1228, 1240 (9th Cir. 1984). Here, petitioner neither  
5 requested instructions on voluntary manslaughter nor argued at  
6 trial that he acted in a "heat of passion." (Rep.'s Tr. at 586-  
7 88, 617, 620, 623, 633.) In such circumstances, the trial  
8 court's decision not to give the jury voluntary manslaughter  
9 instructions did not hinder petitioner's ability to present his  
10 theory of the defense. Bashor, 730 F.2d at 1240. Therefore, the  
11 court's decision on this issue does not present a constitutional  
12 question, and it cannot be challenged in this federal habeas  
13 corpus proceeding. Id.

14 In addition, the State Court of Appeal's rulings on both of  
15 petitioner's arguments are not contrary to, or an unreasonable  
16 application of, clearly established federal law.<sup>1</sup> The court  
17 reasonably found no evidence of "a sudden quarrel or heat of  
18 passion," which was required to support an instruction on  
19 voluntary manslaughter. Cal. Penal Code § 192(a); People v.  
20 Breverman, 19 Cal.4th 142, 162-63, 77 Cal.Rptr.2d 870 (1998).  
21 The court also reasonably found that there was sufficient  
22 evidence of petitioner's guilt at trial to support his conviction  
23 for conspiracy to commit murder.

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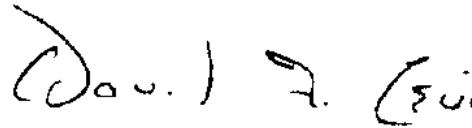
25 <sup>1</sup> Petitioner's habeas petition "was filed after the  
26 effective date of, and is thus subject to, the Anti-Terrorism and  
Effective Death Penalty Act." Weaver v. Thompson, 197 F.3d 359,  
362 (9th Cir. 1999).

1 Finally, neither of the issues raised by petitioner warrants  
2 an evidentiary hearing. There are no disputed issues of fact that  
3 require resolution by evidentiary hearing.

4 For these reasons, petitioner's petition for a writ of  
5 habeas corpus is DENIED.

6 IT IS SO ORDERED.

7 Dated: June 27, 2005  
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DAVID F. LEVI  
12 United States District Judge  
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